Supreme Court, U.S.
FILED
APR 30 1993
OFFICE OF THE CLERK

No. 92-1567

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JUANITA S. BROWN,

Petitioner,

v.

INSHIRAH FARHOUD and
GERMANTOWN MUTUAL INSURANCE COMPANY,

Respondents.

Petition for Writ of Certiorari to the Wisconsin Court of Appeals

PETITIONER'S REPLY BRIEF

THOMAS JAMES DROUGHT
Counsel of Record
WILLIAM A. JENNARO
THOMAS J. LONZO
COOK & FRANKE S.C.
660 East Mason Street
Milwaukee, Wisconsin 53202-3877
(414) 271-5900

Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	1
I.	
THE PETITIONER'S CONSTITUTIONAL ARGUMENTS WERE RAISED BEFORE THE WISCONSIN COURT OF APPEALS AND THE WISCONSIN SUPREME COURT	1
II.	
ASSUMING ARGUENDO THAT THE CONSTITUTIONAL QUESTIONS WERE NOT RAISED BELOW, THE PETITIONER IS NOT PRECLUDED FROM RAISING THEM IN THIS COURT	3
CONCLUSION	4

TABLE OF AUTHORITIES

Cases	PAGE
Carlson v. Green, 446 U.S. 14 (1980)	3
Wood v. Georgia, 450 U.S. 261 (1981)	3
Youakim v. Miller, 425 U.S. 231 (1976)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JUANITA S. BROWN,

Petitioner,

v.

INSHIRAH FARHOUD and GERMANTOWN MUTUAL INSURANCE COMPANY,

Respondents.

Petition for Writ of Certiorari to the Wisconsin Court of Appeals

PETITIONER'S REPLY BRIEF

INTRODUCTION

The Petitioner, Juanita S. Brown, incorporates herein by reference each section of her Petition for Writ of Certiorari. The following arguments are in reply to Respondents' Brief in Opposition to the Petition.

ARGUMENT

I.

THE PETITIONER'S CONSTITUTIONAL ARGUMENTS WERE RAISED BEFORE THE WISCONSIN COURT OF APPEALS AND THE WISCONSIN SUPREME COURT.

Contrary to the respondents' argument, the petitioner raised the constitutional arguments in both the Wisconsin

Court of Appeals and the Wisconsin Supreme Court. The Wisconsin Court of Appeals issued an opinion adverse to the petitioner. The petitioner appealed that decision via a petition for review to the Wisconsin Supreme Court. A majority of the Wisconsin Supreme Court denied the petition for review without opinion. Justice Shirley S. Abrahamson dissented from the Wisconsin Supreme Court's opinion.

In the Wisconsin Court of Appeals the petitioner raised the constitutional issues. In the last section of her brief filed with the Wisconsin Court of Appeals, the petitioner argued that even if Judge Fine applied the subjective analysis on recusal under Wisconsin law and determined on his own that he should not be recused, he should have been recused nonetheless because the history of recusals evidenced an "appearance" of partiality. The petitioner argued to the Wisconsin Court of Appeals:

> Judge Fine's past actions and decisions are indicative of his previous determination of the existence of the **apparent** inability to act impartially in cases involving Turner.

The "appearance of partiality" issue is the same objective constitutional due process issue raised in the petition filed with this court.

Without question, the petitioner raised the constitutional issue in its petition for review to the Wisconsin Supreme Court. The second argument of the petitioner before the Wisconsin Supreme Court was titled:

> "A REAL AND SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW IS PRESENTED."

In the Wisconsin Supreme Court the petitioner again raised the constitutional argument and cited several United States Supreme Court decisions which were in conflict

with the Wisconsin statute which permits the subjective test to be the determiner of whether a judge should be recused.

Thus, the claim by the respondents that the issues before the United States Supreme Court were not raised below are without merit.

II.

ASSUMING ARGUENDO THAT THE CONSTITUTIONAL QUESTIONS WERE NOT RAISED BELOW, THE PETITIONER IS NOT PRECLUDED FROM RAISING THEM IN THIS COURT.

Even **if** it were determined that the petitioner did not raise the constitutional arguments in the courts below, the petitioner is not automatically precluded from raising these issues with this court. Although the United States Supreme Court does not normally decide issues not presented below, the court is not precluded from doing so. *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980); *citing Youakim v. Miller*, 425 U.S. 231 (1976).

In several cases this court has determined that the question presented was so important that even though it was not raised below it could be raised in the Supreme Court. For example, in *Wood v. Georgia*, 450 U.S. 261 (1981), a state court decision was reviewed concerning a conflict of interest in likely violation of the due process clause. The due process ingredient had not been challenged below or in the petition for certiorari. This court found that a remand was "required in the interests of justice," and noted that when there is fundamental unfairness in the proceedings it will exercise jurisdiction. *Wood*, 450 U.S. at 265, n.5. The petitioner here has likewise argued that there has been a "fundamental unfairness" in the proceed-

ings in the Wisconsin Court of Appeals when Judge Fine presided over her appeal despite a history in which there was a blatant appearance of partiality and actual self disqualification by the judge over a period of 9 years.

CONCLUSION

Because the constitutional issues were raised in both the Wisconsin Court of Appeals and the Wisconsin Supreme Court and the Court of Appeals decision was adverse to the petitioner and the Supreme Court did not entertain the petitioner's petition for review, the constitutional issues are properly before this court.

In any event, this court has the power to decide these important issues concerning the petitioner's constitutional rights.

Dated: April 30, 1993.

Respectfully submitted,

THOMAS JAMES DROUGHT
Counsel of Record
WILLIAM A. JENNARO
THOMAS J. LONZO
COOK & FRANKE S.C.
660 East Mason Street
Milwaukee, Wisconsin 53202-3877
(414) 271-5900

Attorneys for Petitioner